IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-268

TOMAS LOPEZ ALMENDAREZ, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAW OFFICES OF GARCIA & GARCIA
RAMON GARCIA
107 N. 10th
Edinburg, Texas 78539
Attorney for Petitioner

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

CITATIONS

IN THE

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TOMAS LOPEZ ALMENDAREZ, *Petitioner*

v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Tomas Lopez Almendarez, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the district court below, entered in the above entitled case on July 2, 1976.

OPINION BELOW

The opinion delivered by the Fifth Circuit Court of Appeals is reported at 534 F.2d 648 (1976), and is appended to this Petition as Appendix "A". The opinion delivered by the United States District Court for the Southern District of Texas, which was affirmed by the Court of Appeals, is attached as Appendix "B".

Also attached as Appendix "C" is a copy of the judgment of the Court of Appeals. A copy of the order denying the Petition for Rehearing en Banc is attached hereto as Appendix "D". A copy of the Stay of Mandate is appended hereto as Appendix "E".

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on July 2, 1976 (See Appendix "A"). The jurisdiction of the Supreme Court is invoked pursuant to 18 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Whether or not the decision of the United States Court of Appeals for the Fifth Circuit is in conflict with the decision of other Courts of Appeal on the same subject matter.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment Four:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue except on probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment Five:

". . . nor be deprived of life, liberty, or property without due process of law."

United States Constitution, Amendment Six:

". . . to be confronted with the witnesses against him . . ."

Rule 26, Federal Rules of Criminal Procedure:

"In all trials the testimony of witnesses shall be taken orally in open court unless otherwise provided."

STATEMENT OF THE CASE

The petitioner was indicted on November 11, 1975 for the offense of knowingly and intentionally importing 3,065 pounds of marijuana into the United States from Mexico, contained in the first count of the indictment, and intentionally possessing with intent to distribute 2,065 pounds of marijuana, in the second count of the indictment. Thereafter, on January 14, 1976, the Respondent's motion to dismiss count one of the indictment was granted, the Petitioner was found guilty after a trial before the Court of intentionally possessing with intent to distribute, 3,065 pounds of marijuana, after pleading not guilty.

A pre-sentence investigation was ordered, and on February 20, 1976, the Court sentenced Petitioner to serve five (5) years imprisonment with a special term of parole of two (2) years. From such action, the Petitioner appealed. The conviction was affirmed by the United States Court of Appeals for the Fifth Circuit on July 2, 1976, in the *United States of America v. Tomas Lopez Almendarez*, 534 F.2d 648 (1976). The Court of Appeals found that the informer was merely a tipster and not an active participant in the offense charged, therefore holding that the Respondent was not required to disclose his identity. Thereafter, Petitioner filed a Petition for Rehearing on July 15, 1976, with the United States Court of Appeals, in its opinion affirming the Judgment of Con-

viction, did not rule on Petitioner's Point of Error Number Two, which is as follows:

> The Trial Court erred in denying Defendant's Motion to Require Disclosure of Identity of Informer because the information supplied by said informer provided the "Main Bulk" or case of evidence used to establish probable cause in this case.

The Court of Appeals denied Petitioner's Petition for Rehearing on July 23, 1976.

On August 2, 1976, the Court of Appeals issued its mandate, and Petitioner filed his Motion to Recall and Stay Mandate Pending Certiorari, in the Court of Appeals. Meanwhile, the Honorable Judge of the United States District Court for the Southern District of Texas at Brownsville issued an Order that Defendant surrender to the United States Marshal. Then, on August 11, 1976, the Court of Appeals issued an order granting Petitioner's motion for recall and stay of mandate pending certiorari until and including August 22, 1976 and requested that the clerk of the District Court for the Southern District return the opinion and judgment issued as mandate.

Reasons For Granting the Writ:

1. Under Supreme Court Rule 19(1)(b), a Writ of Certiorari may be granted when a court of appeals has made a decision in conflict with the decisions of other courts of appeal on the same subject matter. In the instant case the Fifth Circuit's decision in the area of law concerning the required disclosure of an informant's identity by the government, is not entirely consistent with several relevant courts of appeal decisions.

In the Court of Appeal's opinion, it is stated that "where, as here, an informant is merely a tipster and not an

active participant in the offense charged, we have repeatedly held that the Government is not required to disclose his identity." It is the Petitioner's position that such a decision is in conflict or inconsistent with the principle that "the informer's identity should be disclosed where it is vital to a fair trial or vital to the integrity of the conviction." *United States v. Hanna,* 341 F.2d 906 (6th Cir., 1965); *United States v. Coke,* 339 F.2d 183 (2nd Cir., 1964).

The instant case is similar to other courts of appeals decisions wherein it has been held that the "disclosure of the identity of the informer will be required whenever the informer's communications are essential to the establishment of probable cause, that is that the information provided by the informer comprised the essence or core or main bulk of the evidence used to establish probable cause by the arresting officer. *United States v. Tucker,* 380 F.2d 206 (2nd Cir. 1967); *United States v. Elgisser,* 334 F.2d 103 (2nd Cir.), *cert. den. sub. nom; United States v. Robinson,* 325 F.2d 391 (2nd Cir. 1963); *United States v. Commissiong,* 429 F.2d 834 (2nd Cir., 1970).

In the instant case there is no question that the information provided by the informant comprised the essence or core or main bulk of the evidence used by the officers to establish probable cause. On page 30 of the Record on Appeal, Lines 21 to 25, the officer in charge testified to the effect that the *only reason* (emphasis added) he stopped and searched Petitioner's vehicle was because of the information that he received from this informer. All of the evidence presented at the trial of this cause clearly demonstrates that the information provided by the informer herein was the only basis for stopping and searching the Petitioner's vehicle and arresting him. Absent this information, the officers had no other evidence to establish probable cause.

If the Court of Appeals' decision is to allow the non-disclosure of an informer's identity when he has provided the *only* basis used for the establishment of probable cause, it would unjustly, and without due regard to the fundamental requirement of fairness, restrict and/or deprive a defendant of an extremely vital and relevant element to the preparation of his defense.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

LAW OFFICES OF GARCIA & GARCIA
107 N. 10th
Edinburg, Texas 78539

RAMON GARCIA
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Ramon Garcia, a practicing attorney and a member of the Bar of the State of Texas for over a period of three years and an applicant to the Bar of the Supreme Court of the United States, do hereby certify that two (2) copies of the foregoing Petition for Writ of Certiorari have been served on Respondent by depositing same with the United States Postal Service, Certified Mail, postage prepaid, addressed as follows: Anna E. Stool, Suite 3, 1219 Autrey St., Houston, Texas 77025, on this the ____ day of August, 1976.

RAMON GARCIA

APPENDIX "A"

Opinion of the United States Court of Appeals

UNITED STATES of America,
Plaintiff-Appellee,

v.

Tomas Lopez ALMENDAREZ,
Defendant-Appellant.

No. 76-1672

Summary Calendar.*

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

July 2, 1976.

Defendant was convicted before the United States District Court for the Southern District of Texas, Reynaldo G. Garza, Chief Judge, of possession of marijuana with intent to distribute, and he appealed. The Court of Appeals held that where informant did not participate in offense, Government was not required to disclose his identity, that requirement that informant be credible and reliable was met, and that evidence to effect that defendant was apprehended near the Mexican border in the middle of the night driving truck containing over 3,000 pounds of marijuana was sufficient to support his conviction.

Affirmed.

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* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part. I.

Appeal from the United States District Court for the Southern District of Texas.

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

PER CURIAM:

Tomas Lopez Almendarez was convicted following a jury-waived trial of possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a). On appeal, he contends that the District Court erred (1) in refusing to require disclosure of the identity of the informant who provided the information which led to his arrest; (2) in holding that the Government had met its burden of establishing that the informant was credible and reliable under *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964); and (3) in denying his motion for acquittal based on the alleged insufficiency of the evidence. We affirm the conviction.

On September 28, 1975, a Drug Enforcement Administration (DEA) agent received a call from a confidential informer advising him that a large truck with a red and white cab, high sideboards, and trumpet air horns mounted on the roof was being loaded with marijuana near the Rio Grande River in the vicinity of Fronton, Texas. Surveillance was set up covering the possible routes out of the loading area, and after several hours of waiting, a truck matching the informant's description appeared. The truck was stopped, approximately 3,065 pounds of marijuana were found, and the appellant, who was the driver and sole occupant of the truck, was arrested and advised of his rights.

[1] Where, as here, an informant is merely a tipster and not an active participant in the offense charged, we

have repeatedly held that the Government is not required to disclose his identity. *Bourbois v. United States,* 5 Cir., 1976, 530 F.2d 3; *United States v. Clark,* 5 Cir., 1973, 482 F.2d 103; *United States v. Herrera,* 5 Cir., 1972, 455 F.2d 157; *United States v. Mendoza,* 5 Cir., 1970, 433 F.2d 891, *cert. denied,* 401 U.S. 943, 91 S.Ct. 953, 28 L.Ed.2d 225 (1971). While the informant relayed information based upon personal observation, he did not participate in the offense, and the District Court properly denied appellant's motion seeking disclosure of his identity.

[2] The informant in question had provided reliable, independently verifiable information on numerous prior occasions. Moreover, the information regarding the description of the truck was corroborated by independent observations of various DEA agents prior to the time the truck was stopped. *Aguilar's* requirement that the informant be credible and reliable was thus met. See *United States v. Squella-Avendano,* 5 Cir., 1971, 447 F.2d 575.

[3] Finally, viewed in the light most favorable to the Government, *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), the evidence adduced at trial to the effect that appellant was apprehended near the Mexican border in the middle of the night driving a truck containing over 3,000 pounds of marijuana was more than sufficient to support his conviction.

AFFIRMED.

APPENDIX "B"

Opinion of the United States District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CRIMINAL NUMBER 75-B-340

UNITED STATES OF AMERICA

vs.

TOMAS LOPEZ ALMENDAREZ, aka,
TOMAS ALMENDAREZ-LOPEZ

Honorable Edward B. McDonough, Jr., United States Attorney, of Houston, Texas, and John Patrick Smith, Assistant United States Attorney, of Brownsville, Texas, for the Government.

Garcia & Garcia (Ramon Garcia) of Edinburg, Texas, for the Defendant.

MEMORANDUM AND ORDER

"The Defendant, Tomas Lopez Almendarez, aka Tomas Almendarez-Lopez, was indicted by a Grand Jury on two counts. Count One charges that on September 28, 1975, the Defendant knowingly and intentionally imported 3,065 pounds of marihuana into the United States from Mexico, in violation of 21 U.S.C. §952(a). The second count

alleges that on the same date the Defendant knowingly and intentionally did possess, with intent to distribute, 3,065 pounds of marihuana, contrary to 21 U.S.C. §841(a)(1). The Defendant pleaded not guilty to both counts, and subsequently filed a Motion to Suppress Evidence and a Motion to Require Disclosure of Identity of Informer.

"On January 5, 1976, a hearing on Defendant's Motions was begun. However, it soon became apparent that the testimony of an absent witness, who was out of the country, was critically necessary for a just and informed determination of the issues posed by the Motions. The hearing was therefore postponed. On January 14, this action came on for trial. At that time, in open court and in writing, the Defendant waived his right to be tried by a jury. In addition, the Government moved that the first count of the indictment be dismissed, which Motion was granted. The trial before the Court commenced thereafter, with Defendant's Motions heard simultaneously.

"The Government called three witnesses: Jesse M. Torrez and Jack W. Derington, Special Agents for the Drug Enforcement Administration, and Supervisory Customs Patrol Officer Lloyd Springer. Drug Enforcement Administration Agent Michael L. Harper testified briefly at the hearing on January 5, but was not recalled on January 14. At the conclusion of the testimony on January 14, the Defendant stipulated that a sample of the substance seized was sent to a chemist, analyzed and found to be marihuana. Additionally, the Defendant stipulated that the chain of custody was properly maintained. Both sides then closed. From the evidence presented, this Court finds the facts to be as delineated below.

"On September 28, 1975, at around 8:30 p.m., Agent Torrez received a call from a confidential informer. This

informer had furnished information which proved reliable on several occasions in the past. One tip led directly to an arrest about two years ago. Subsequently, the informer has provided information 10 or 15 times, confirming data already obtained concerning marihuana and heroin transactions; on one of these occasions, people and purchase money were found, but not the heroin, and on the other occasions the people escaped, although marihuana debris was sometimes found.

"The informer told Agent Torrez he had just observed a large truck—with a red and white cab, high sideboards, and "trumpet" air horns mounted on the roof—being loaded with marihuana immediately near the Rio Grande River and in the Fronton, Texas, area. The informer knew the substance was marihuana because of the sacks in which it was contained. The informer also stated that he saw a man at the loading spot whose nickname is "Tornillo"; according to Agent Torrez, Tornillo is a well-known smuggler in the Roma-Rio Grande area. The informer did not mention the Defendant. As indicated above, the informer acquired his information by sight, but he did not participate in the commission of the offense.

"Agent Torrez decided not to attempt an interception of the illicit activities at the loading spot. Based on experience in similar past situations, he determined that he could not have approached unseen, and that if he tried to do so he would have found a lone loaded truck. Instead, Agent Torrez radioed other officers to set up "surveillances" at two points on Highway 83, one of which the truck would necessarily pass upon exiting from the river area. Fronton Road leads directly from the Rio Grande River north to Highway 83; there is no way to get to 83 except via Fronton Road, and once 83 is reached, one

must turn either left or right on that East-to-West highway. The 83 - Fronton Road junction is about five miles north of the Rio Grande River.

"Officer Springer received a description of the truck from Agent Torrez. At around 8:45 p.m., Springer and another Agent established a surveillance on Highway 83, two miles east of Fronton Road. Torrez "set up" just to the east of Fronton Road and other Agents established a lookout to the west of that road on 83. All of the Agents maintained radio contact through Agent Torrez.

"After waiting a while, Agent Torrez began to worry about the truck, which had not yet been observed. Torrez contacted the informer, and the latter assured Torrez that the truck had not emerged from the river area. The informer then joined Torrez on Highway 83. When the truck came out and passed Torrez' position, shortly after 1 a.m. (September 29), the informer identified the vehicle.

"The truck turned to the East on Highway 83, passed Agent Torrez' location, and then passed Officer Springer at about 1:10 a.m. Torrez and Springer followed the truck in separate vehicles. Meanwhile, Agent Torrez had radioed a description of the truck to Agent Derington, who was at the Port of Entry Bridge in nearby Roma, Texas. At around 1:10 a.m., Agent Derington was approaching Highway 83 from a road which runs parallel with, and east of, Fronton Road. He spotted the truck travelling east on Highway 83, and he, too, trailed the Defendant.

"Officer Springer passed the truck and then stopped it. The stop was made about three miles east of Fronton Road and about one mile east of Springer's surveillance point. The Defendant was the driver and the sole occupant. The Agents climbed onto the back end of the truck, lifted up

a tarp, and observed numerous sacks of marihuana. Sacks which were each three to three and a half feet high covered the entire cargo area, and the Agents smelled the odor of marihuana. In all, there were approximately 3,065 pounds of marihuana; the wholesale price at the time of the seizure was about $20 per pound.

"Agent Torrez then placed the Defendant under arrest and advised him in Spanish of his rights. The Defendant stated he understood his rights, and Torrez asked if the Defendant had anything to say. The Defendant said that he had been hired in McAllen, Texas, by an unknown Mexican male, and that he was given $35 to drive the truck back to McAllen, but he did not know what was in the truck. Finally, the Defendant took Agent Torrez to a location, about a mile from the Rio Grande River, where he claimed he had picked up the truck; Agent Torrez did not believe the Defendant was telling the truth.

"The registered owner of the truck is Antonio Balades. However, Agent Torrez checked out the latest address and found it to be nonexistent.

"By his Motion to Suppress Evidence, Defendant claims that he was arrested without a warrant, that the information available to the officers did not constitute probable cause, and that the informer was neither credible nor reliable; therefore, he contends, his statements and all tangible evidence must be suppressed. For the reasons discussed below, these claims are wholly lacking in merit.

"Although the general rule is that searches must be conducted pursuant to a duly authorized search warrant, several exceptions to the rule are recognized. All elements of the "probable cause plus exigent circumstances" exception are fully satisfied in this case.

"In *Williams v. United States,* 404 F.2d 493, 494 (C.A. 5, 1968), the Fifth Circuit Court of Appeals held: ". . . there is probable cause to search when there exists (sic) facts and circumstances sufficient to warrant a reasonably prudent man to believe that the vehicle contains contraband." Since the "facts and circumstances" in this case relate largely to the informer's tip, the two-prong test of *Aguilar* — that is, the credibility and reliability of the informer — must be supported by the evidence. *Aguilar v. Texas,* 378 U.S. 108 (1964).

"The credibility of the informer was solidly shown. Reliable information had been provided by him on numerous prior occasions. In addition, Agent Torres knew of the reputation and background of Tornillo, one of the observed participants at the loading spot. *United States v. Harris,* 403 U.S. 573, 583 (1971).

"Evidence concerning the underlying facts which demonstrated the informer's reliability is equally conclusive. The information was obtained through personal observation. *United States v. Harris, supra,* at 581. Furthermore, the informer supplied a wealth of detail. Finally, his prediction that the described truck would travel from the river area via Fronton Road to Highway 83 proved correct, as independently verified by at least three government agents. *Weeks v. Estelle,* 509 F.2d 760, 765 (C.A. 5, 1975).

"It should be noted that the existing probable cause was not nullified or impaired by the fact that there was radio communication among the agents or that the search was not personally conducted by the agent who received the informer's tip. Quoting in part from an earlier decision, the Court observed in *United States v. Nieto,* 510 F.2d 1118, 1120 (C.A. 5, 1970), "that 'probable

cause . . . can rest upon the collective knowledge of the police, rather than solely on the officer who actually makes the arrest,' when there is 'some degree of communication between the two.' "

"Having determined that the agents had probable cause to search the truck, the next inquiry concerns whether or not exigent circumstances existed. An affirmative answer is clearly dictated by the facts. The movable vehicle was stopped on the highway and the sole occupant was alerted. See *Chambers v. Maroney,* 399 U.S. 42, 51 (1970). As the Court succinctly stated in *United States v. Rodriguez,* 523 F.2d 738, 740 (C.A. 5, 1975), "where there is probable cause to search an automobile, an immediate search is constitutionally permissible."

"Defendant's second Motion urges this Court to require disclosure of the informer's identity. Several grounds purportedly demonstrating the need for such identity are asserted. Immediately after the conclusion of the trial of this case, the Defendant, his counsel and counsel for the Government were called to chambers. This Court had then just received copies of two decisions pronounced by the Fifth Circuit Court of Appeals in which disclosure of the informer's identity and *in camera* interview with the informer were discussed. *United States v. Freund,* 525 F.2d 873 (C.A. 5, 1976); *United States v. Doe,* 525 F.2d 879 (C.A. 5, 1976). Upon reviewing the decisions with counsel, this Court concluded that an *in camera* interview was not warranted in this case. That conclusion remains firm; Defendant has completely failed to establish the requisite predicate for either disclosure or *in camera* interview.

"In the case of *Roviaro v. United States,* 353 U.S. 53, 62 (1957), the Supreme Court of the United States

announced the now familiar guidelines for assessing the need for disclosure:

> 'We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.'

"The considerations in this case weigh heavily against disclosure. Uncontradicted evidence revealed that the informer did not participate in the commission of the offense. In fact, althugh he did observe the loading of the marihuana, he was even less involved in the transaction than the informer in *United States v. Clark,* 482 F.2d 103 (C.A. 5, 1973). Yet disclosure was denied in *Clark*: "We have held that where the evidence shows that an informer is nothing more than an informer and does not participate in the transaction, no disclosure of his identity is required." *United States v. Clark, supra,* at 104. Finally, it is inconceivable to this Court that the informer "set up" the Defendant, thus risking the loss of a truck and over $60,000 worth of marihuana.

"In his Motion, Defendant contends that the informer could aid in a determination of the existence of entrapment. However, Defendant made no proffer regarding such a defense, and "the mere invocation of the word 'entrapment' does not magically create a viable defense." *Alvarez v. United States,* 525 F.2d 980 (C.A. 5, 1976).

"The sole defense raised at this nonjury trial was the lack of probable cause. To this extent, *United States v. Freund, supra,* is similar to the instant case. However, unlike Freund, this *is* an "ordinary tipster situation" and the issue of probable cause *is not* a close one. "When the informant plays no part in the prohibited transaction but merely supplies information which leads to probable cause for an arrest or search, the proper balance is more easily struck. We have held that where the evidence shows that an informer is a mere tipster, no disclosure of his identity is required." *United States v. Freund, supra,* at 876.

"At the conclusion of the evidentiary stage of the trial, counsel for the Defendant cited four opinions from other Circuits which discussed disclosure in relation to probable cause. *United States v. Gocke,* 507 F.2d 820 (C.A. 8, 1974), cert. denied, 420 U.S. 979 (1975); *United States v. Hurse,* 453 F.2d 128 (C.A. 8, 1971), cert. denied, 414 U.S. 908 (1973); *United States v. Comissiong,* 429 F.2d 834 (C.A. 2, 1970); *United States v. Tucker,* 380 F.2d 206 (C.A. 2, 1967). This Court, however, is bound only by decisions of the Fifth Circuit Court of Appeals and of the Supreme Court of the United States. *United States v. Northside Realty Associates, Inc.,* 518 F.2d 884, 886 (C.A. 5, 1975). In addition to the matters already discussed, Defendant offered few clues concerning the materiality and relevancy of disclosure to his case — as *this* Circuit requires. See *Alvarez v. United States, Supra,* at Footnote 6. Moreover, the reasoning and interpretations articulated in the four cited opinions do not compel a contrary resolution of the disclosure issue.

"Testimony did emerge relating to a potential defense. Specifically, the evidence revealed that after he was placed

under arrest, the Defendant told Agent Torrez he did not know what was in the truck. However, this testimony was elicited by the Government on direct examination. The Defendant did not even remotely indicate reliance upon an "unknowing possession" defense, and disclosure of the informer's identity is therefore patently unnecessary. It should also be noted that Agent Torrez did not believe Defendant. In addition, even if disclosure were ordered and even if the informer were to testify that he did not see the Defendant at the loading spot, Defendant would not thereby achieve exoneration. The circumstances severely and substantially contradict an assertion of unknowing possession: in close proximity to the Rio Grande River and in the middle of the night, Defendant was in sole control of a large truck containing over 3,000 pounds of odorable marihuana.

"Finally, yet another factor further tips the scales against disclosure. One of the weighty considerations in the balancing process is protection of the flow of information. From the evidence presented, it can be inferred that the informer's usefulness in the future hinges upon his continued anonymity. Undetected and unsuspected observation is clearly critical to his procurement of information, and the bountiful flow of trustworthy tips which he provides would be jeopardized by disclosure of his identity.

"Accordingly, Defendant's Motion to Suppress Evidence and Motion to Require Disclosure of Identity of Informer are hereby denied.

"Based upon the evidence adduced at trial and upon the stipulations entered into between the Defendant and the United States Attorney, this Court finds that the Defendant, Tomas Lopez Almendarez, aka Tomas Almen-

darez-Lopez, did knowingly and intentionally possess, with intent to distribute, 3,065 pounds of marihuana. As discussed above, the circumstances support an inference of knowing and intentional possession. Furthermore, because of the large quantity of marihuana involved, intent to distribute can be, and is, inferred. This Court finds the Defendant guilty beyond a reasonable doubt of the offense charged in Count Two of the Indictment.

"The Defendant, Tomas Lopez Almendarez, will appear before this Court on February 20, 1976, at 9:00 a.m. for sentencing.

"The Clerk will send copies of this Memorandum and Order to the Defendant, his counsel, and the United States Attorney.

"DONE at Brownsville, Texas, on this the 20th day of February, 1976.

/s/ REYNALDO G. GARZA
Reynaldo G. Garza
United States District Judge"

APPENDIX "C"

Judgment of the United States Court of Appeals Affirming the District Court

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 76-1672
Summary Calendar

D. C. Docket No. CR-75-B-340

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

TOMAS LOPEZ ALMENDAREZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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Before AINSWORTH, CLARK and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 2, 1976

Issued as Mandate: August 2, 1976

APPENDIX "D"

Denial of Petition for Rehearing

IN THE
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 76-1672

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

TOMAS LOPEZ ALMENDAREZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(JULY 23, 1976)

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX "E"

Mandate Recalled and Stayed

UNITED STATES COURT OF APPEALS
Fifth Circuit

Office of the Clerk

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130

August 11, 1976

TO ALL COUNSEL AND THE DISTRICT CLERK:

No. 76-1672—U.S.A. v. Tomas Lopez Almendarez

MANDATE RECALLED AND STAYED TO AND INCLUDING August 22, 1976
(SEE ENCLOSED ORDER)

Gentlemen:

The court has this day granted the recall and stay of the mandate to the date shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38 LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

By copy of this letter to the clerk of the District Court, we request that he return the opinion and judgment issued as mandate on August 2, 1976.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ MARY BETH BUCEUX
Deputy Clerk

enc.
cc Mr. Ramon Garcia
Ms. Anna E. Stool
Mr. V. Bailey Thomas, Clerk